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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

VAL/DEL, INC.,
a Delaware corporation, Petitioner

v.

PASCUA YAQUI TRIBE,
a Putative Indian Tribe, and
THE HONORABLE LILLIAN S. FISHER,
Judge of the Superior Court
of the State of Arizona in and
for the County of Pima, Respondents

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF ARIZONA, DIVISION TWO

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1978, the Congress enacted a Bill, P.L. 95-375, 92 Stat. 712, 25 U.S.C.A. §1300(f), which recognized members of an Arizona nonprofit corporation as members of an Indian tribe called the Pascua Yaqui Tribe. The Bill thus made them eligible for Federal assistance to Indians. It also directed the Secretary of the Interior to accept in trust, as Indian lands, real property previously conveyed to the non-profit association. The group being benefited never had any governmental organization within Arizona or within the United States. When Arizona was admitted to statehood in 1914, there was no semblance of any Yaqui Tribe within the State of Arizona or within the United States. The questions presented for review are:

1. Does congressional recognition under P.L. 95-375 vest the Pascua Yaqui

Tribe with sovereign immunity from the process and jurisdiction of the courts of the State of Arizona?

2. If P.L. 95-375 does purport to bestow such sovereign immunity, is it beyond the powers of Congress to provide for or regulate commerce with Indian tribes?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. The Honorable Lillian S. Fisher is a judge of a court of general jurisdiction within the State of Arizona as to whom a special Writ was taken to the Court of Appeals of the State of Arizona, which decision is the subject of this Petition for Certiorari.

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ON WRIT OF CERTIORARI TO
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Petitioner Val/Del, Inc., respectfully requests this Court to issue its Writ of Certiorari to review the decision of the Court of Appeals of the State of Arizona, Division Two, as to which review has been denied by the Supreme Court of the State of Arizona.

OPINIONS BELOW

The decision of the Arizona Court of Appeals as to which review is sought is attached as Appendix A and is not yet reported. The Order of the Supreme Court of the State of Arizona denying breview of the decision of the Court of Appeals is unreported and is attached as Appendix B.

STATEMENT OF JURISDICTION

The decision of the Supreme Court, denying certiorari was issued on May 29, 1985. This Petition is timely filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, §8 of the Constitution of the United States provides:

> "The Congress shall have Power To . . . regulate commerce . . . with the Indian Tribes."

The Tenth Amendment to the Constitution of the United States provided:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Public Law 95-375, 92 Stat. 712, 25 U.S.C. §1300(f) provides in pertinent part:

> "(a) Eligibility for services and assistance
>
> The Pascua Yaqui Indian people who are members of the Pascua Yaqui Association, Incorporated, an Arizona corporation, or who hereafter become members of the Pascua Yaqui Tribe in accordance with section 1300f-2 of this title, are recognized as, and declared to be, eligible, on and after September 18, 1978, for the services and assistance provided to Indians because of their status as Indians by or through any department, agency, or instrumentality of the United States, or under any statute of the United States. For the purposes of section 2005a of Title 42, the Pascua Yaqui Indians are to be considered as if they were being provided hospital and medical care by or at the expense of the Public Health Service on August 16, 1957.

* * *

(c) Receipt in trust by United States of land for Pascua Yaqui Tribe; criminal and civil jurisdiction

> The Secretary of the Interior is directed, upon request of the Pascua Yaqui Association, Incorporated, and without monetary consideration, to accept on behalf of the United States and in trust for the Pascua Yaqui Tribe, the title to the real property conveyed by the United States to such association under the Act of October 8, 1964 (78 Stat. 1197), and such lands shall be held as Indian lands are held: *Provided,* That the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79)." Section 1300f-1.

STATEMENT UNDER RULE 28.4(c)

Since the proceeding draws into question the constitutionality of Public Law 95-375, 92 Stat. 712, 25 U.S.C.A. §1300(f), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is

a party, it is noted that 28 U.S.C.A. §2403(a) may be applicable.

STATEMENT OF THE CASE

This case arises out of a suit brought in the Arizona Superior Court, by Petitioner Val/Del, Inc., to enforce an arbitration provision of a contract made with the Yaqui Indian Tribe. The Tribe moved to dismiss the complaint for lack of jurisdiction over the Defendant, and the trial court dismissed Petitioner's Complaint on the grounds that the Defendant had sovereign immunity and that the agreement to arbitrate was not sufficient to waive its immunity.[1] Petitioner filed an original action in the Arizona Court of Appeals by

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[1] Petitioner had in its Complaint denied that Yaquis have sovereign status or immunity (¶2; App. 2-B to Petition for Review to the Arizona Supreme Court). The issue was also argued before the trial court in Petitioner's Opposition to Motion to Dismiss, §II, pp. 6-11 (App. 2-E to Petition for Review).

filing an extraordinary writ, called a Petition for Special Action.[2] The Arizona Court of Appeals, Division Two, reversed the trial court on the question of whether the agreement to arbitrate was a waiver of immunity, but affirmed its order that the Defendant was a Tribe clothed with sover-

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[2] This "Special Action" is not an appeal, but an original action in the appellate court. *See* Ariz. Const., art. 6, §§5, 18; Rule 1, Rules of Procedure for Special Actions; 17A Ariz. Rev. Stat. Ann. (West 1973). The decision, which "terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final even, if further proceedings are to be had in the lower court." *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 385, n. 7 (1976); and cases cited, *ibid.*

eign immunity.[3] The opinion held that enactment of 25 U.S.C.A. §1300(f)[4] automatically conferred sovereign immunity upon the Defendant, although the statute does not do so by its terms, but merely recognizes the Yaquis as eligible for Federal benefits to Indians. In determining that recognition automatically granted sovereign immunity, the Arizona court quoted from *Atkinson v. Haldane*, 569 P.2d 151 (1977), to the effect that:

> "Once the executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the Community

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[3] Before the Arizona Court of Appeals, the issues now raised were argued in Petitioner's Memorandum in Support of Petition for Special Action (App. 2 to Petition for Review to Ariz. S. Ct.). See pp. 9-14 therein, arguing that Congress cannot grant sovereign status to a group of people not fulfilling the definition of a tribe; and pp. 14-16, arguing that P.L. 95-375 does not afford sovereign status or immunity.

[4] Public Law 95-375, 92 Stat. 712, 25 U.S.C.A. 1300(f).

is entitled to all of the benefits of tribal status." 569 P.2d at 162.

Petitioner sought discretionary review by the Arizona Supreme Court.[5] The Arizona Supreme Court denied review on May 29, 1985 (App. B, *infra*).

The group of people which the Act recognizes as a Tribe are immigrants from Mexico, or their descendants. The relevant facts upon which a decision of tribal status depends consists of the history of these Yaquis, who immigrated to the United States individually or in small groups, over an extended period of time, to escape persecution in Mexico.

The definitive history of the Yaquis is contained in two works by a renowned anthropologist, which are part of the

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[5] Such review, of decisions of the Court of Appeals, is authorized under A.R.S. §12-120.24. There is no appeal of right.

record.[6] Spicer's historical facts were not disputed by Respondent, and were accepted by the Court of Appeals, which recognized that the Pascua Yaqui Indians were not indigenous to the State of Arizona, nor to the United States, but were immigrants from Mexico, and that they have not attempted to revive any system of government that their predecessors may have established in Mexico.

We summarize here Spicer's Yaqui history, which is described in fuller detail

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[6] Spicer, Edward H. [1906-1983], *The Yaquis -- A Cultural History*, University of Arizona Press 1980 (Petition for Review, App. 2-K). The citation 'II' is to distinguish this work from an earlier work, *Pascua -- A Yaqui Village in Arizona*, completed in 1938, but published by the University Press posthumously in 1984, which will be referred to as 'Spicer I' (*id.*, App. 2-J). Professor Spicer was an eminent anthropologist with highest national recognition (see inside of titlesheet of Spicer II) and *the* recognized authority on the Yaqui culture (see Affidavit of Prof. Michael Meyer, *id.*, App. 2-L).

in the Petition for Review, part of the record below.

When the Spaniards came to the area of what is now Sonora, Mexico, in 1533, they found native peoples called "Hiaquis" by the Spaniards (Spicer II, 5, 10). Their culture was centered around eight towns in the Yaqui Valley, on both sides of the Yaqui River. These peoples shared an agricultural economy (*id.*). Beginning in 1617, they were profoundly influenced by Jesuit missionaries. For 150 years, Yaqui communal life centered around Jesuit missions built in the "Eight Towns". A special and most pervasive theology developed which was an amalgamation of Christianity and indigenous religion (Spicer II, 70-73).

After the expulsion of the Jesuits in 1767 (*id.*, 50), and before the Mexican Revolution of 1810, there were numerous military clashes between the Spanish-speaking settlors and the Yaquis. The

Yaquis were subjugated to Spanish authority for military purposes, but each Yaqui town kept its own local government, through its elected officers (*id.*, 134).

For the next hundred years, the Yaqui culture was pressed by the influx of Mexican colonization and the "Yaqui Wars" ensued, which resulted in periodic suppressions of Yaqui revolts and the deportation of Yaquis, who were impressed into the Mexican military and ordered to remote regions, such as the Yucatan (*id.*, 137-49). Of the estimated 20,000 Yaquis in Mexico in 1890, only 3,500 stayed in the original Yaqui country. This time, between the late 1880's and 1937, is characterized by Spicer as that of the "broken communities" (*id.*, 298). There was a total eclipse of Yaqui political life (*id.*, 320).

During the times of Mexican military suppression, various Yaquis, as individuals, or as fragmented family groups, had

crossed the border into the United States. Until 1923, there had been no regular checking point set up by U.S. Immigration Service (*id.*, 247). The Yaquis migrations were tolerated by the United States under a doctrine of political asylum (*id.*, 242).

The greatest time of Yaqui influx was between 1900 and 1910, at the end of which decade 60% of all Yaquis who migrated to Arizona had arrived. There was a second wave of immigration between 1916-17 (*id.*, 245). After 1918, the "waves" had ceased; a few more of these peoples fled to Arizona in 1927-28 when there was an outbreak of anti-Yaquism in Sonora (*id.*, 236-48). Spicer postulates that there was still a "trickle" of Yaqui immigration as of the 1970's, and some reverse migration back to Sonora over the years (*id.*).

In the early years of the immigration, the Yaquis were scattered, going wherever employment could be found and where there

was unoccupied land. By 1918, the situation had begun to change. Concentrations developed in the early 1920's in the Tucson, west Scottsdale,[7] south Phoenix and Yuma (Somerton) areas of Arizona.

In the area of Tucson, Federal immigration authorities encouraged the Yaquis to concentrate in one area, so that it would be easier to keep track of them (Spicer II, 237). An area grew up that was to become known as "Pascua Village", but which had no specific geographical boundaries (*id.*, 239). Spanning neighborhoods ("Barrios") of Mexican and Mayo families, Pascua Village physically merged imperceptibly into the City of Tucson Corporate Limits (Spicer I, p. 6). There, 850 individuals who regarded themselves as Yaquis

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[7] This settlement of farm workers was completely disbanded in 1944 by the Salt River Project, upon whose lands the Yaquis had been given space (Spicer II, 241).

lived among non-Yaquis, and by 1937, two-thirds of the "Yaquis" residing in Pasqua Village were United States-born citizens (*id.*, 8).

In 1937, in addition to Pascua Village, there was another concentration of Yaquis in the Barrio Libre, immediately adjacent to and southwest of downtown Tucson, with population about equal to Pascua's. Two other major Yaqui communities then existed in the State -- Guadalupe (south of Phoenix) and Eskatel (Scottsdale). These four communities, each centered around a church, remained stabilized in population, each having about 400-500 persons, from the mid-1930's until the mid-1960's, while the scattered Yaqui population throughout the State grew from 3,000 to 6,000 in this same period of time (Spicer II, 246).

Contrasted to the Yaqui towns of Sonora, none of the communities in Arizona

had fixed territorial boundaries. Rather, the settlements were territorially amorphous, blending into surrounding non-Yaqui households. The Yaqui community was not a residential unit but was identified by participation in religious ceremonies: "The Yaqui community, then, could be defined as a congregation rather than a residential unit" (*id.*, 300).

The Yaquis never revived the civil and military features of the town governments of Sonora in this country, because they recognized that functions of their traditional officers were being fulfilled by Federal and State officials (*id.*, 244).[8]

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[8] In 1923, Pascua Village Yaquis did elect some "judges". The only judgment rendered by their judges was not generally accepted. The complaint was then taken to a Superior Court judge, who made a decision which was accepted. Thus ended the idea of Yaqui civil government in Arizona (Spicer II, 244).

In 1964, this gradual assimilation of Yaqui immigrants into American society was reversed by congressional passage of a private bill (Private Law 88-350, 78 Stat. 1196), which granted 200 acres of Federal land, located ten miles southwest of Tucson, to the "Pascua Yaqui Association, Inc., a nonprofit corporation formed under the laws of Arizona". Accompanying this grant of land was a grant of $99,000.00 by the Office of Economic Opportunity to this Association (Spicer II, 254).

These grants became a subject of acrimonious public debate. Residents of Pascua Village (to become known as "Old Pascua"), who did not want to move objected.[9] Other Yaqui communities resented what they considered a singling out for special benefits

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[9] Only about one-third of the Pascua Village Yaquis moved to New Pascua (Spicer II, 239).

of only one of several Yaqui communities (*id.*, 254-55).

The Association, in determining who was eligible for membership and land in New Pascua, rejected qualifications based on "blood", but instead went to a ceremonial or religious qualification -- permitting "any person who has been ceremonially associated with the Yaqui Indians" to participate (*id.*, 256). Thereafter, "Yaquis", as thus delineated, from all over southern Arizona were assigned lots by the Association. By 1979, New Pascua had become the largest "Yaqui" community in Arizona, with a population of over 1,000. Old Pascua retained more than 350, while Tucson's Barrio Libre had 500-600 (*id.*, 257). In 1977, Guadalupe, of approximately equal size, had incorporated as an Arizona municipality (*id.*, 258).

In 1978, Public Law 95-375, which is of concern in this case, was passed. It

provided that membership in this "tribe" would be granted to (A) all members of the Pascua Yaqui Association, Inc., who applied for enrollment in the Tribe within one year from the date of the Act; (B) all persons of "Yaqui blood" who were citizens of the United States and who, within two years from the date of the Act, were admitted to membership in the Association; and (C) direct lineal descendants of persons falling within categories A or B. The Act provides that the members of the "tribe" are eligible for the services and assistance provided to Indians by any department, agency or instrumentality of the United States. Within thirty months, the "tribe" was required to adopt a constitution and bylaws and a membership roll, all of which were to be published in the Federal Register.

This "tribe" has never been able to agree on a constitution or bylaws

(see Affidavit, Petition for Review, App. 2-E-D), and consequently, neither a constitution nor bylaws has been published in the Federal Register (See Affidavit, Petition for Review, App. 2-E-B).

Summarizing, the 200 acres over which the Respondent contends the State of Arizona has little or no jurisdiction, was never, until 1964, associated in any way with Yaqui culture. The Yaqui people are not indigenous to this country; rather, they are natives of an area that is part of Mexico. At the time of the admission of Arizona to the Union, February 14, 1912, there were only scatterings of Yaquis in this state; discernible Arizona communities of Yaquis were then nonexistent. Pascua Village was not even conceived until 1921. The geographical boundaries of this "village" were indefinite; it was an integral part, for all civil and criminal law purposes, of the City of Tucson and of the

State of Arizona. There has never been, in this country, any semblance of self-government by these Yaqui immigrants, except to the extent that they participate in the politics of this country as citizens. The right to participate in the "tribal" activities now transpiring in New Pascua is not based on ancestry but is determined by ". . . who has been ceremonially associated with the Yaqui Indians". This "tribe" has never been able to agree on a constitution or bylaws. It is this group of persons, integrated more by religion than anything else, that has been declared by the decision below to have sovereign immunity from suit in the courts of general jurisdiction of this State.

REASON FOR GRANTING THE WRIT

This case is of fundamental importance to the State of Arizona, and particularly to those of her citizens living in the Tucson area.

When Arizona was admitted to the union, it received the same sovereignty and prerogatives as an original state. *Shively v. Bowlby*, 152 U.S. 26, 30 (1894). When Arizona was admitted as a state, the Yaquis had no territory or government within this State; and Arizona Yaquis have never had any of the attributes of a sovereign nation. But on the strength of Public Law 95-375, the persons associated together as the Pascua Indian Tribe are now exercising police powers, are excluding the State from taxing its people and its lands, and are claiming the immunities of a sovereign nation.

The opinion below agreed with Petitioner that the Yaquis did not exhibit those characteristics required for recognition as a sovereign Indian nation (Opinion, App. A at 4-6), but held, on the authority of *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), that the issue raised is a

"nonjusticiable political" question. The opinion quotes from *Haldane*, but otherwise contains no analysis of the vital question posed.[10] This Court should grant certiorari to decide whether Congress really intended to constrict the sovereignty of Arizona, and if so, whether the Act is within Congress' constitutional powers to regulate commerce with the Indians.[11]

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[10] The Arizona Court of Appeals did address the issue of whether any sovereign immunity vested in the Yaquis by Public Law 95-375 was waived by the provisions of 28 U.S.C.A. §1360; an issue not raised here.

[11] The Congressional authority to give special treatment to Indian tribes originally derived from both the treaty making power and the power to regulate commerce with the Indian Tribes. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Congress discontinued treaty making with Indians in 1871, and the modern authorities refer to the Indian Commerce Clause as the primary constitutional provision supporting Congressional authority over Indians. F. Cohen, *Handbook of Federal Indian Law*, Ch. 3, §A at 208.

Determining the relationship of Indian tribes in this country to the governmental structure at large has always been an important facet of this Court's jurisdiction.[12] That relationship is an ". . . anomalous one, and of a complex character." *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 1112 (1886). But the the Court below did not begin to assess that anomalous and complex relationship, and its reflexive conclusion clashes with important precedent from this Court, and allows a result that plainly exceeds what was intended to be covered by the Indian Commerce Clause.

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12 This Court has often had to review the Arizona courts on the subject. *E.g.*, *Williams v. Lee*, 358 U.S. 217, (1959); *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); and *Central Machinery Co. v. Ariz. State Tax Commissioner*, 448 U.S. 160 (1980).

The Congress' power under the Indian Commerce Clause is limited to situations in which a tribe has historically had a distinct existence as such:

> "As long as these Indians *remain* a distinct people, with an *existing tribal organization*, recognized by the political department of the government, Congress has the power to say with whom and on what terms they shall deal . . ." *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 195 (1876) (emphasis added).

This Court has held that Indian tribal sovereignty does not arise by delegation from, or creation by, the United States Government, but by Federal Government tolerance of a *pre-existing* sovereignty. *E.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("distinct political communities, having territorial boundaries, within which their authority is exclusive"); *United State v. United States Fidelity & Guaranty*, 309 U.S. 506, 512 (1940) (". . . it is as though the immunity

which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did"). But even *Atkinson v. Haldane*, recognized:

> "Rather, we think it [tribal sovereign immunity] advances the principle of allowing *formerly self-governing units* brought within the sovereign powers of the United States to retain some vestige of that sovereignty until the great sovereign decides that discontinuance of that vestige is in the interests of public policy." 569 P.2d at 160 (emphasis added).

As our nation expanded, and Western states were added in areas occupied by sovereign Tribes, Congress possessed the authority to regulate intercourse with these Tribes, and protected those sovereign powers from encroachment by the states. Indian sovereignty is not to be created anew, but is to be tolerated to allow existing tribes to persevere. But where sovereign governments have not persevered, this Court has held that the sovereignty of

the states should not be restrained. *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973), demonstrates the point. In *McClanahan*, this Court held that Arizona's income tax could not be applied to a Navajo Indian's income earned on a Navajo reservation. In his opinion for the Court, Justice Marshall distinguished three previous decisions which had permitted state laws to be operative as to Indians, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); and *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), because these were decisions as to Indians ". . . who do not possess the usual accoutrements of tribal self-government" (411 U.S. at 168, 169).

In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), this Court said:

> "Altnough there are remnants of the form of tribal sovereignty, these Indians [Five Civilized Tribes] have no effective tribal sovereignty as in *Worcester v. Georgia, supra,* . . ." 319 U.S. at 603.

McClanahan stated:

> "It must always be remembered that the various Indian tribes were once independent sovereign nations, and that their claim to sovereignty long predates that of our own government." 411 U.S. at 172.

The only rationale for granting sovereign immunity to Indian tribes -- tolerance of a pre-existing sovereignty -- is not present here. Congress has no power to take back the sovereignty which it has granted to the State of Arizona over its territory. Accordingly, if Congress intended to grant sovereign immunity to the Pascua Indian Tribe (which it never expressly did), it exceeded its authority.

The Arizona Court of Appeals' opinion on this issue did not recognize these cases, nor apply these principles. Instead,

it relied solely upon *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). Although involving an Indian tribe which had migrated from another country, *Atkinson* is no support for creating an Indian tribe out of a group of peoples who have never historically had any semblance of tribal status. *Atkinson* was concerned with the Metlakatla Indian Community which had "an organized tribal government before they migrated from British Columbia to Alaska" (569 P.2d at 153). This tribe had a ". . . village council as a legitimate governing body" (*id.*). When it arrived upon a Federal land grant in Alaska in 1887, the Metlakatla established a tribal government which ". . . passed bills, collected taxes, appointed police officers, carried out public works and looked after public safety" (*id.*). In 1891, some sixty-seven years before Alaska was granted statehood, Congress granted to these Indians a

reservation on the Annette Islands (the only Indian reservation in the vast state of Alaska) (*id.*).

> "The history of the Metlakatlans reveals a strong central tribal organization unlike most Alaska Native groups." 569 P.2d at 155.

Atkinson was apparently cited by the Court below primarily for its pronouncement that the recognition of an Indian tribe is a "nonjusticiable political question" (569 P.2d at 162). But *Atkinson* has no support for that conclusion, and its conclusion and that of the Court below in this case is contrary to cases of this and other Federal courts. In *Baker v. Carr*, 369 U.S. 216 (1962), the Court considered whether the tribal status of Indian communities is a political question:

> ". . . it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . Able to discern what is 'distinctly Indian', . . . the courts will strike any heedless

> extension of that label. *They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.*" 369 U.S. at 710 (emphasis added).

Indian law decisions indicate that, while it may be a political question whether to "recognize" a tribe for Federal government protection and benefits, the determination that an Indian community is entitled to tribal status is not. Congress has unfettered power to decide when "recognition" of a tribe shall end:

> ". . . Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship [recognition] which has been maintained over the Indians shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage." *United States v. Sandoval*, 231 U.S. 28 (1913).

However, Congress does not have unfettered power to create an Indian tribe where none existed before:

> "[I]t is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the question whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Ibid.*

See also Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957), in which the Fourth Circuit inquired into the history of the Cherokees: the manner in which they acquired their land and their relationship with the Federal Government, to determine that the group deserved tribal status (*id.*, 294-95). Only after determining that the group was entitled to tribal status did the court apply the rule that it remained a political question whether the tribe should continue to enjoy the protective and regulatory power of Congress (*id.* at 296).

The Court's rule was also applied in *Narragansett Tribe of Indians v. Southern Rhode Island Land & Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976), which recognized that a court "will not stand impotent before an obvious instance of manifestly unauthorized exercise of power" (*id.*, 814). It concluded that the determination of tribal status of the plaintiffs did not implicate the factors discussed in *Baker v. Carr* and, thus, did not constitute a political question.

In other words, Congress could hardly bestow "tribal" status upon bands of immigrants such as the Irish who fled the potato famine; or refugees fleeing from Vietnam or Central America; or Haitian or Cuban "boatmen"; without being subject to judicial review of whether those groups, or the Yaquis of this case, are sovereign Indian tribes.

There remains the question of whether Congress really intended to confer sovereign immunity on the Pascua Yaqui Tribe by enacting 25 U.S.C. §1300(f) (App. 2-M). This Act does not expressly grant sovereign immunity. When a statute or ordinance

> ". . . is susceptible to different readings, one reading which would make it constitutional and a second which would make it unconstitutional, . . . a court must read the statute to be constitutional." *Anderson v. Edwards*, 505 F. Supp. 1043, 1048 (S.D. Ala. 1981). *See Osborne v. Massachusetts Bonding & Ins. Co.*, 229 F. Supp. 674 (D. Ariz. 1964).

25 U.S.C. §1300(f) is a statute which is susceptible to both a constitutional and an unconstitutional meaning in that it may be interpreted to confer sovereignty or merely recognize the tribe for the purpose of extending welfare benefits.

An Indian group may be recognized by the Federal Government as a tribe for some purposes, but not for others:

> "[T]ribes cannot be neatly divided into 'recognized' and 'nonrecognized' tribes for all purposes; rather, a tribe may 'exist' for some purposes but not for others." F. Cohen, *Handbook of Federal Indian Law*, *supra*, ch. 1, §B(2)(a), p. 7.

In this Act, Congress obviously intended to extend certain welfare benefits to these Indians, but also obviously intended that these lands remain under the civil and criminal jurisdiction of the State of Arizona. This intent is being frustrated by the granting of sovereign immunity to this "tribe". The Court below seemed oblivious to the proposition that a hard look should be given to a statute for a construction that may uphold its constitutionality. It also did not consider the possibility of the Act being valid to bestow Federal benefits on the Yaquis without automatically clothing them with sovereignty which had been taken away from Arizona.

This Court must grant review even though the court below granted Petitioner some relief. After ruling that the Yaquis were a sovereign Indian tribe, the court concluded that it had waived its immunity, to allow arbitration of the dispute before it. This leaves Petitioner with incomplete relief, for two reasons. On the merits, the Yaquis have raised their Indian status as a bar to substantive enforcement of the contract because, they assert, it was an agreement that should have been approved by the Bureau of Indian Affairs but wasn't.[13] More importantly, a waiver for arbitration does not appear to solve the problem of tribal sovereignty barring the Arizona Superior Court from serving process, or

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13 The court below refused to pass upon that issue, finding it to have been waived before the trial court. Petitioner believes that waiver to be final, and not remediable, but Respondent may disagree.

levying execution of judgment, upon Yaquis or the Yaqui lands.

In *Williams v. Lee*, 83 Ariz. 241, 248, 319 P.2d 998 (1958), *overruled on other grounds*, 358 U.S. 217 (1959), the Arizona Supreme Court has said that process to execute on a judgment may not run to reservation property. This Court and others have held that jurisdiction might be conferred only for rendition of verdict and entry of judgment, *Memphis & C. RR. Co. v. Tennessee*, 101 U.S. 337 (1880); *Westinghouse Electric Co. v. Chambers*, 164 Cal. 131, 145 P. 1025 (1915), leaving the sovereign to determine for itself whether to pay the judgment. *Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 709 (2d Cir. 1930). Even if Petitioner were ultimately successful in countering these precedents, the land itself, held in trust, may remain immune from levy if the Act is not invalidated. *Snohomish County v.*

Seattle Disposal Co., 425 P.2d 22, 25 (Wash. 1967).

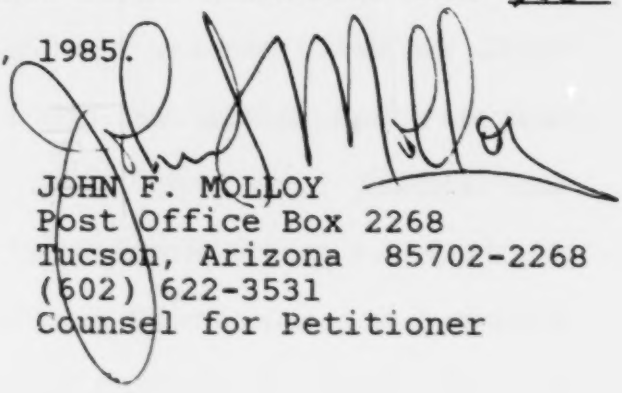
Petitioner has been granted only partial relief, because the court below ruled against Petitioner on the Federal question now raised here. It is an issue of institutional significance, and must be addressed and correctly decided.

CONCLUSION

There is no justification for granting sovereign immunity to this group of people, who are held together mostly by participating in religious ceremonies; it is contrary to the basic concepts of Indian law to allow this carving up of the State of Arizona into another sub-sovereignty. The granting of civil, criminal and tax immunity to this particular group because some of them, or their ancestors, were part of a Mexican culture with identifiable religious and societal values is unprecedented and can only have very unfortunate long range

consequences. Certiorari should be granted.

RESPECTFULLY SUBMITTED this 26th day of August, 1985.



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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VAL/DEL, INC., a Delaware corporation, Petitioner,	)	NO. 2 CA-SA 133
vs.	)	O P I N I O N
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pima, HONORABLE LILLIAN S. FISHER, a Judge thereof, Respondents, and PASCUA YAQUI TRIBE, Real Party in Interest.	)	[Filed Jan 2, 1985]

SPECIAL ACTION PETITION

RELIEF GRANTED

B I R D S A L L, Chief Judge.

This special action has been taken from the trial court's dismissal of the petitioner's complaint. We have accepted jurisdiction because the petitioner's remedy by appeal is not adequate and because the question presented is a matter of great significance to those who may desire to do business with the respondent tribe. See State ex rel. Corbin v. Superior Court of Maricopa County, 138 Ariz. 500, 675 P.2d 1319 (1984); University of Arizona Health Sciences Center v. Superior Court of the County of Maricopa, 136 Ariz. 579, 667 P.2d 1294 (1983).

On January 11, 1984, the real party in interest Pascua Yaqui Tribe and Val/Del, Inc., the petitioner, entered into an agreement whereby Val/Del was to manage the tribe's newly established bingo operation. The agreement called for Val/Del to be retained on an exclusive basis to finance, manage, and operate the bingo operation for

the tribe for a seven-year period commencing January 1, 1984. On or about May 13, 1984, the tribe apparently excluded petitioner's employees and managers from the property, alleging the existence of certain defaults by petitioner under the management agreement.

On June 27, 1984, petitioner filed its complaint in the present lawsuit in Pima County Superior Court seeking to have the arbitration clause of the agreement enforced. Service was made upon the tribe on June 27, 1984, and its motion to dismiss was filed July 9 and granted on August 7. The court found that the Pascua Yaqui Indian Tribe is a federally recognized tribe entitled to sovereign immunity and cannot be sued without having waived such immunity or otherwise granted its consent to suit. Although the trial court found that the tribe had consented to having a lawsuit between the parties tried in its tribal

court, it held that the arbitration clause in the subject contract was not a legally sufficient waiver of sovereign immunity to permit the action in state court and dismissed the complaint.

The powers of Indian tribes have been described as "inherent powers of a limited sovereignty which has never been extinguished." F. Cohen, Handbook of Federal Indian Law 122 (U.N.M. ed. 1971). Before the Europeans arrived, Indian tribes were self-governing sovereign political entities. See McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). One of the inherent powers possessed by Indian tribes like all sovereign bodies, was immunity from suit. In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), Justice Marshall stated the basis of this immunity:

> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization' the 'Indian Nations are exempt from suit.'" 436 U.S. at 58, (citations omitted).

Arizona courts have also recognized the doctrine of tribal sovereign immunity. In Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968), our supreme court held that state courts did not have jurisdiction over an Indian tribe which had allegedly committed a tort while engaging in a business enterprise in the State of Arizona but outside the boundaries of the tribal lands. The court held that the Colorado River Indian Tribe was a sovereign immune from suit and could not be subjected to the jurisdiction of Arizona courts without its consent or the consent of Congress. A similar result was reached in White

Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971), and both cases were noted in the recent Division One case of S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (App. 1983).

We note here that sovereign immunity as discussed in these cases seems to be limited to decisions wherein jurisdiction of state and federal courts was thwarted. However, since one of the primary purposes of the doctrine of sovereign immunity is to protect tribal trust property from encumbrances, Atkinson v. Haldane, 569 P.2d 151 (Alaska, 1977), it must necessarily mean freedom from suit regardless of where the suit is brought. The immunity of Indian tribes, however, is not absolute. United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981). It exists only at the sufferance of Congress and is subject to complete defeasance. United States v. Wheeler, 435 U.S.

313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Either explicit congressional authority or consent of a tribe is necessary to find a waiver of the immunity. United States v. Oregon, supra.

Petitioner's first point of attack is that the tribe does not enjoy sovereign immunity since it does not possess the requisite characteristics of a sovereign Indian nation as set forth in regulations promulgated by the Department of Interior. See 25 C.F.R. Part 83. The procedures established in those regulations, which petitioner alleges must be met before a tribe will be accorded federal recognition and therefore enjoy immunity from suit, include:

> "(a) [T]he petitioner [tribe] has been identified from historical times until the present on a substantially continuous basis, as 'American Indian' or 'aboriginal.'
>
> * * *

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present." 25 C.F.R. §83.7.

Petitioner presented to the trial court two books [1/] by Dr. Edward H. Spicer as Authority for the proposition that the Pascua Yaqui Tribe would not qualify for federal recognition under the Code of Federal Regulations requirements. Spicer was an acknowledged authority on the history of the Pascua Yaquis, and his books establish that the Yaquis do not have single roots but are a historically mixed-blood people who lived in western Mexico on the Gulf of California from approximately the 1600's to

the present. Beginning in the late 1880's, small groups came from time to time across the international border to Arizona and California. Therefore, petitioner argues, since the Pascua Yaquis are not indigenous to this area, but rather are immigrants from Mexico, and because Dr. Spicer's books show that the tribe has not attempted to revive any system of government their predecessors may have established in Mexico, they would not qualify for federal recognition under 25 C.F.R. §83.7. We cannot fault this conclusion and, in essence, neither does the tribe.

The tribe relies instead on 25 U.S.C. §§1300f-1300f(2) which were adopted by Congress in 1978 and in which Congress recognized the Pascua Yaqui Indian people and declared them eligible

> "for the services and assistance provided to Indians because of their status as Indians or through any department, agency, or instrumentality of the United

> States, or under any statute of the United States." 25 U.S.C. §1300f(a).

Additionally, Congress provided that certain provisions of 25 U.S.C. §§461-492 entitled "Protection of Indians and Conservation of Resources," would be extended to the Pascua Yaqui Indian people. Included in that subchapter is §479, the definition section, which recognizes the term Indian as referring to all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction. The Supreme Court of Alaska, in Atkinson v. Haldane, supra, was presented with a similar situation involving the Metlakatla community. The court found that, although the Metlakatla community had come to Alaska from British Columbia, that that was not a significant factor in view of the fact that the community had been recognized by the federal government as an organized tribe and thus should be given

the protections accorded other tribes. The court stated:

> "[The tribe asks] application of the principle that tribes under the tutelage of the United States are immune from suit in the absence of congressional consent. . . .
>
> Thus, we conclude that the Metlakatla Indian Community, despite its unique history, is entitled to sovereign immunity. . . . The Community has been recognized by the United States government as an Indian tribe and has been treated accordingly. Once the executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the Community is entitled to all of the benefits of tribal status. The Supreme Court of the United States declared in U. S. Fidelity [United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940)] that one of those benefits is tribal sovereign immunity in the absence of congressional waiver. Court decisions from United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) to McClanahan v. State Tax Commission, 411 U.S. 164, 170-72, 93 S.Ct. 1257, 1261-62, 36 L.Ed.2d 129, 134-36 (1973) have firmly established plenary congressional power over Indian affairs. Article VI, clause 2 of

> the United States Constitution provides:
>
> 'This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.'
>
> The supremacy of the decisions of the Supreme Court of the United States has been recognized since Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816). Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case." 569 P.2d at 162-3.

Petitioner contends that regardless of the recognition by the federal government of the Pascua Yaqui Indian people in 25 U.S.C. §1300f, that recognition was conditioned upon the tribe's waiver of sovereign immunity because of the provisions of 25 U.S.C. §1300f(c):

> "Provided, That the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79)."

The act of August 15, 1953, referred to in subsection (c), commonly known Public Law 280, extended to certain states criminal jurisdiction over offenses committed by or against Indians in Indian country (18 U.S.C. §1162) and civil jurisdiction over causes of action arising in Indian country to which Indians are parties (28 U.S.C. §1360). PL-280 apparently began as an attempt by California to extend criminal jurisdiction to all Indian lands within the state. It has been pointed out that the extension of state criminal jurisdiction was the primary thrust of the legislation and that the civil section was added without great discussion. Atkinson v. Haldane, supra. PL-280 automatically transferred

the jurisdiction of certain civil and criminal matters involving Indians on Indian lands to five enumerated states -- California, Minnesota, Nebraska, Oregon, and Wisconsin -- and tendered the same jurisdiction to all others. The statute was amended in 1968 in conjunction with the adoption of the Indian Civil Rights Act, 25 U.S.C. §§1301-1341 to require that future assumptions of jurisdiction by a state could be made only with the consent of the tribe in question. 25 U.S.C. §§1321(a) and 1322(a). The amendments also authorized the assumption by states of partial subject matter or territorial jurisdiction and permitted states which had previously accepted jurisdiction to retrocede such jurisdiction to the federal government, either in whole or in part. 25 U.S.C §§1321(a) and 1322(a).

Petitioner contends that, by conferring jurisdiction over Pascua Yaqui lands

to the Arizona courts pursuant to PL-280, the effect of 25 U.S.C. §1300f(c) is to waive the tribe's immunity from suit. This contention rests on the resolution of the question of whether Congress intended PL-280 as a waiver of an Indian tribe's sovereign immunity. In Bryan v. Itasca County, Minnesota, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), the Supreme Court emphasized that the granting of state jurisdiction was not intended to "result in the undermining or destruction of such tribal governments as did exist . . . ." and concluded that "[t]he Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, . . ." 426 U.S. at 388-389. The Bryan Court utilized legislative history in the wording of the act itself to determine what Congress expressly intended and decided to go no further. The Court stated:

> "Of special significance for our purposes, however, is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. . . . This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." 426 U.S. at 381.

The Court went on to state:

> "[T]he consistent and exclusive use of the terms 'civil causes of action,' 'aris(ing) on,' 'civil laws . . . of general application to private persons or private property,' and 'adjudicat(ion)' in both the Act and its legislative history virtually compels our conclusion that the primary intent of §4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court." 426 U.S. at 385.

In Santa Rosa Band of Indians v. King County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 97 S.Ct. 731 (1977), the Ninth Circuit Court of Appeals interpreted 28

U.S.C. §1360 as containing an ambiguity and determined that the rules of construction dictated that all ambiguities be resolved in favor of the Indians. 532 F.2d at 660. Both the Bryan and Santa Rosa Band of Indians Courts thus adopted a narrow interpretation of the grant of jurisdiction to the states in 28 U.S.C. §1360(a).

These cases were followed by the Alaska Supreme Court in Atkinson v. Haldane, supra, where the court concluded that the sovereign immunity of the Indian community therein could be deemed waived only if it were clear from the unambiguous language of 28 U.S.C. §1360(a) and its legislative history that Congress intended such a waiver. The court noted that the legislative history did not specifically mention any waiver of tribal sovereign immunity and that the ambiguity present in 28 U.S.C. §1360(a) was not resolved by the legislative history. The court found the absence

of any clear waiver of sovereign immunity in the statute of controlling significance and concluded that without such an express congressional waiver of immunity, one should not be implied. The court noted that the jurisdictional grant in 28 U.S.C. §1360(a) was limited by 28 U.S.C. §1360(b), which provides:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

The court concluded that the limitation "serves the same interest that the doctrine

of sovereign immunity serves, i.e., the preservation of tribal trust property 'encumbrances.'" 569 P.2d at 167. Therefore, the court theorized, §1360(b) demonstrated that no waiver of tribal sovereign immunity was intended by §1360(a).

> "If Congress had wanted to waive tribal immunity, it strikes us that it would have allowed execution against purely tribal assets, e.g., tribal real property. Since the underlying reasons for the restrictions in §1360(b) are similar to the underlying reasons for tribal sovereign immunity, construing the two subsections together, we conclude that §1360(a) does not constitute a waiver of tribal sovereign immunity." 569 P.2d at 167, n. 59.

We align ourselves with the reasoning of the courts in these cited decisions and hold that Congress, by virtue of its enactment of 25 U.S.C. §1300f(c), which applied 28 U.S.C. §1360(a) and its granting of civil jurisdiction to the State of Arizona over Pascua Yaqui Indian lands, did not

waive the sovereign immunity of the Pascua Yaqui Indian Tribe. 2/

Having concluded that the Pascua Yaqui Indian Tribe, as a federally recognized tribe, is entitled to sovereign immunity, we must now decide if it waived its immunity by agreeing to arbitrate any dispute arising out of its contract with petitioner. Section 12 of the contract provides:

> " Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, supra, quoting United States v. Testan, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976), which quoted United States v. King, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52

(1969). There is only one case cited to us, and our independent research has failed to turn up any other, which has addressed the precise issue of whether an arbitration clause constitutes an explicit waiver of immunity from suit. We agree with the Alaska Supreme Court in its reasoning in Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) wherein it stated:

> "[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. Tucker v. Byler, 27 Ariz.App. 704, 558 P.2d 732, 735 (Ariz.App. 1976); Quenzer v. Quenzer, 225 Kan. 83, 587 P.2d 880, 882 (Kan. 1978). The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the tribe] possessed. Furthermore, under similar circumstances the Ninth Circuit Court of Appeals has held that a clause in a contract stating that the federal courts would resolve

> any disputes arising from the contract constituted an express waiver of a tribe's sovereign immunity. United States v. Oregon, 657 F.2d 1009, 1016 (9th Cir. 1981). There is little substantive difference between an agreement that any dispute arising from a contract shall be resolved by the federal courts and an agreement that any dispute shall be resolved by arbitration; both appear to be clear indications that sovereign immunity has been waived." 658 P.2d at 760-61.

The cited case of United States v. Oregon referred to Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970) wherein the Eighth Circuit found that the adoption by the Omaha Tribe of a "sue and be sued" clause in its corporate charter amounted to an express waiver of sovereign immunity in regard to the quiet title action involved. In United States v. Oregon, supra, the Ninth Circuit Court of Appeals found that the tribe, in its contract with the state, had agreed that in the event problems arose that could not be

solved by mutual agreement, the parties would submit the issues to federal court for determination. The Ninth Circuit ruled that "the Tribe may not at this stage renege on its earlier agreement." 657 F.2d at 1016.

We agree with the reasoning in Native Village of Eyak, supra. Before entering into the arbitration agreement, the respondent tribe was free from suit by petitioner. However, after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity. The tribe argues in its response to the petition for special action that while as an immune sovereign it could not have been sued without its consent, it has given its limited consent to be sued within the jurisdiction of the Pascua Yaqui Tribal Court. We do not agree. The arbitration

agreement did not draw the distinction between the tribal court system and any other court system, but rather provided that any court of competent jurisdiction would suffice. Having expressly waived its sovereign immunity, civil jurisdiction would properly lie with the State of Arizona under 25 U.S.C. §1300f(c) which applied 28 U.S.C. §1360(a) to Pascua Yaqui Indian lands, notwithstanding the fact that the Pascua Yaqui tribal court may also have jurisdiction.

The tribe argues, and argued to the trial court, that even if the arbitration clause were deemed to be a waiver of the tribe's sovereign immunity, the entire contract including the clause is void, citing 25 U.S.C. §81. That statute provides, in part:

> "No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value, in present or in

> prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:
>
> * * *
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

The tribe argues that the agreement between the petitioner and the tribe was not approved or endorsed by the Secretary of the Interior and the Commissioner of Indian Affairs. The record before us is not clear. The signatories to the contract include a Mr. Samuel L. Hilliard, who, it appears, is a representative of the Department of the Interior's Bureau of Indian Affairs. The tribe's motion to dismiss the complaint below did not allude to the allegedly void character of the contract. This argument was raised only in the tribe's response to the petitioner's

opposition to the motion. By inference, the trial court discounted the argument since it referred to the arbitration clause in the contract as not constituting a legally sufficient waiver, thereby implying that the contract itself was to be considered valid. The problem here is that the tribe apparently waived this argument before the trial court and, indeed, before this court by arguing that the controversy over the agreement properly belongs before the tribal court, and not arguing that no agreement existed. On this state of the record we cannot consider this argument in order to deny relief from what we find to be an abuse of discretion by the trial court.

The order of the trial court dismissing petitioner's complaint is vacated and the cause is remanded to the trial court for further proceedings.

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[1]/ E. Spicer, Pascua, A Yaqui Village in Arizona (Univ. of Ariz. Press ed., 1984).

E. Spicer, The Yaquis: A Cultural History (Univ. of Ariz. Press, 1980).

[2]/ The tribe argued below and argues to this court that even if 25 U.S.C. §1300f(c) had given Arizona civil jurisdiction over Pascua Yaqui Indian territory, a proclamation issued by Arizona Governor Bruce Babbitt, dated February 6, 1984, effectively returned jurisdiction to the federal government. That proclamation stated in part:

> "WHEREAS, Public Law 95-375 requires the State of Arizona to exercise criminal and civil jurisdiction over Pascua Yaqui lands as if it had assumed jurisdiction . . . and
>
> WHEREAS, the State of Arizona is constitutionally prohibited from claiming jurisdiction over Indian lands pursuant to paragraph four of Article XX of the Arizona Constitution; and
>
> WHEREAS, this constitutional disclaimer impedes the State from exercising criminal and civil jurisdiction over Pascua Yaqui lands, notwithstanding the Language in PL 95-375, 25 U.S.C. 1300(f)(c) [sic] which purports to grant such jurisdiction to Arizona;
>
> * * *

> I, Bruce Babbitt, Governor of the State of Arizona, . . . do hereby retrocede all civil and criminal jurisdiction, or purported jurisdiction, granted to the State of Arizona, pursuant to Public Law 95-375 over that area of land within this State conveyed to the Pascua Yaqui tribe from the United States and held in trust for the Pascua Yaqui tribe by the United States Secretary of the Interior, . . ."

We note that the alleged retrocession of jurisdiction does not comply with the requirements of 25 U.S.C. §1323(a) which provides that the federal government is authorized to accept a state's retrocession. To effectively retrocede jurisdiction, there must be formal acceptance of the retrocession by the Secretary of the Interior, published in the Federal Register, specifying the date of the retrocession. 25 U.S.C. §1323, note. There is nothing in the record to show acceptance by the Secretary of the Interior nor a published acceptance of same in the Federal Register. Arizona Constitution, Article 20, §4, alluded to above, provides in part that Indian lands "shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." The real party in interest argues that therefore the Arizona Constitution precludes the state from exercising jurisdiction in this case. However, such an argument was found to be without merit in Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837, reh'g denied, 104 S.Ct. 209 (1983) wherein the Supreme

Court recognized state jurisdiction, stating: "[T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our activities on Indian lands." 103 S.Ct. at 3211. Similarly, it has been held that the language of "absolute jurisdiction and control" means "undiminished, not exclusive" jurisdiction. Organized Village of Kake v. Egan, 369 U.S. 60, 71, 82 S.Ct. 562, 7 L.Ed.2d 573, ___ (1962); Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976).

BEN C. BIRDSALL,
Chief Judge.

CONCURRING:

LAWRENCE HOWARD,
Judge.

JAMES D. HATHAWAY,
Judge.

SUPREME COURT
STATE OF ARIZONA

30 May 1985

RE: VAL/DEL, INC. vs. PIMA COUNTY SUPERIOR COURT/HON. LILLIAN S. FISHER/PASCUA YAQUI TRIBE
Supreme Court No. 18079-PR
Court of Appeals No. 2 CA-SA 0133
Pima County No. 217524

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 29, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review [Val/Del, Inc.] = DENIED

FURTHER ORDERED: Petition for Review [Pascua Yaqui Tribe] = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 30th day of May, 1985.

S. ALAN COOK, Clerk

FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR
CLERK

No. 85-348 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VAL/DEL, INC.,
A Delaware Corporation,

Petitioner

v.

PASCUA YAQUI TRIBE,
A Putative Indian Tribe, and
THE HONORABLE LILLIAN S. FISHER,
Judge of the Superior Court of the State of Arizona
in and for the County of Pima,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION TWO

RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1978, Congress enacted 25 U.S.C.A. 1300(f), which recognized the Pascua Yaqui Tribe of Indians in Arizona, and made them eligible for certain benefits to Indians. This legislation also directed the Secretary of the Interior to accept in trust, as Indian lands, real property previously conveyed to the Indian Association.

This Tribe of Indians had been in existence for centuries, pre-dating European discovery. Yaqui Indians have resided in what is now the State of Arizona for over 200 years. When Arizona was admitted to Statehood in 1914, Yaqui settlements had existed for over 100 years, in areas known as Tumacacori, and in other areas within what is now the State of Arizona.

By virtue of the enactment of the above legislation, 25 U.S.C. 1300(f) (b) applied the Indian Reorganization Act, 25 U.S.C. 461, et seq., to the Pascua Yaqui Tribe. Further, under 25 U.S.C. 1300(f) (c) Congress applied PL 83-280, 18 U.S.C. 1162, to the Pascua Yaqui Tribe.

The questions presented for review are:

1. Did the enactment of 25 U.S.C. 1300(f) serve to recognize the sovereign status of the Pascua Yaqui Tribe, such that the Tribe would be immune from process and jurisdiction of the Courts of the State of Arizona?

2. Assuming that 25 U.S.C. 1300(f) does recognize the sovereign immunity of the Pascua Yaqui Tribe, was it beyond the authority of Congress to do so, under the powers of Congress to provide for or regulate commerce with Indian Tribes?

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No. 85-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VAL/DEL, INC.,
A Delaware Corporation,

Petitioner

v.

PASCUA YAQUI TRIBE,
A Putative Indian Tribe, and
THE HONORABLE LILLIAN S. FISHER,
Judge of the Superior Court of the State of Arizona
in and for the County of Pima,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION TWO

RESPONSE TO PETITION FOR CERTIORARI

Respondent Pascua Yaqui Tribe, respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Court of Appeals of the State of Arizona, Division Two, as to which review has been denied by the Supreme Court of the State of Arizona.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. The Honorable Lillian S. Fisher is a judge of the Superior Court of the State of Arizona, the court of general trial jurisdiction within that State, as to whom

a special Writ was taken to the Court of Appeals of the State of Arizona, by Petitioner Val/Del, Inc., which decision is the subject of this Petition for Certiorari.

Respondent Pascua Yaqui Tribe was the defendant in the court of general jurisdiction, and was the "Real Party In Interest" when the special Writ was taken to the Court of Appeals. Respondent Pascua Yaqui Tribe specifically objects to the captioning in this case by Petitioner Val/Del, Inc., insofar as the Pascua Yaqui Tribe is referred to as a "putative" Indian Tribe. Not only is this designation inconsistent with all pleadings below, but it is an erroneous designation both factually and legally. For this case to be printed or reported under such a caption would be improper, and would be scandalous to the Respondent Pascua Yaqui Tribe. Therefore, the Respondent Pascua Yaqui Tribe requests that the caption in this Court be amended to read "Pascua Yaqui Tribe, an Indian Tribe".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

25 U.S.C. 1300(f) (b), which was deleted by Petitioner, states:

> "The provisions of Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this Title are extended to such members described in sub-section (a) of this Section."

STATEMENT UNDER RULE 28.4(c)

Petitioner's Statement should be appropriately designated under Rule 28.4(b), as opposed to its current designation under Rule 28.4(c).

STATEMENT OF THE CASE

This case arises out of a lawsuit brought in the Arizona Superior Court by Petitioner Val/Del, Inc. against Respondent Pascua Yaqui Tribe. For purposes of the remainder of this Response to the Petition for Writ of Certiorari, and for convenience and to avoid confusion, Respondent will refer to Petitioner Val/Del, Inc. as "Val/Del", and will refer to Respondent Pascua Yaqui Tribe as "the Tribe".

The background of the case is that, on January 11, 1984, Val/Del and the Tribe entered into a "management agreement" wherein Val/Del was to manage the Yaqui Bingo operation on a fee basis.[1] The introduction of said contract describes the Tribe as "an organized tribe as defined in Section 16 of the Act of June 18, 1934."[2] In the recitals the Tribe is referred to as "Federally Recognized".

This contract had an arbitration clause, Section (12) of which stated:

> "*Arbitration* Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

This contract was not approved by the Secretary of the Interior pursuant to 25 U.S.C. 81.

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[1] Petition for Special Action to Arizona Court of Appeals, Appendix, attachment to Exhibit A.

[2] Indian Reorganization Act, 25 U.S.C. 461, et seq.

On or about June 27, 1984, Val/Del filed a Complaint in the Superior Court of the State of Arizona, in and for the County of Pima, and service was attempted by serving the Tribal Chairman at the Pascua Yaqui Indian Reservation.

The Tribe filed a Motion to Dismiss under Rule 12(b), Arizona Rules of Civil Procedure, alleging jurisdictional grounds and insufficiency of service of process. The basis of the Motion was tribal sovereignty.

Val/Del responded by alleging that the Tribe did not deserve sovereign status. It argued three alternative theories: (a) that 25 U.S.C. 1300(f) provided that Arizona shall exercise criminal and civil jurisdiction, and no effective retrocession of the State's jurisdiction had been accepted by the federal government; (b) that the Pascua Yaquis were not sovereign, since they were not indigenous to Arizona, they had no "political" organization and they do not otherwise meet the guidelines under 25 CFR, Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe"; and (c) that the Tribe waived its immunity by virtue of the arbitration clause in the contract.

In its second argument presented above, Val/Del presented extrinsic evidence in the form of an exhibit. That exhibit was a photocopy of pages 4-9 and pages 146-173 of "Pascua, A Yaqui Village in Arizona", by Edward H. Spicer.[3] This exhibit was attached to the pleadings without accompanying affidavit, foundation,

[3] From this point on the Tribe will use the abbreviations "Spicer I" and "Spicer II" as set forth in footnote 6 of Val/Del's Petition for Certiorari.

or explanation, and was relied upon by Val/Del as a factual basis for arguing that the Tribe should not have been recognized as a Tribe by Congress.[4]

In reply the Tribe pointed out, among other things, that the use of the Spicer publication was questionable, and could certainly not be used to overrule Congressional mandate. Further, the Tribe argued that *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) (relied upon by Val/Del for the proposition that an arbitration clause waived sovereign immunity) was distinguishable on the basis that the instant arbitration clause was contained within a void contract (because not approved by the Secretary of the Interior) and that the instant arbitration clause was therefore void.

The Superior Court granted the Motion to Dismiss. There is no indication that the Court gave any credence to Val/Del's exhibits of "historical fact".[5]

Val/Del filed a special Writ to the Court of Appeals of the State of Arizona, Division Two. Then, for the first time, Val/Del attached an affidavit along with two complete volumes of literature (Spicer I and II), in an attempt to support its earlier allegation that the Tribe should not be recognized as a Tribe.[6] The affidavit, from a colleague of Dr. Spicer, was apparently intended to raise these two books to the level of facts capable of

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[4] See Petition for Special Action to the Court of Appeals, Appendix, attachment to Exhibit E.

[5] See Petition for Special Action, Appendix Exhibit H, for the trial court's Minute Orders.

[6] Petition for Special Action, Appendix Exhibits L, M and N.

being judicially noticed under Rule 201(b), Arizona Rules of Evidence. This was, of course, not properly placed before the Superior Court in order for it to have taken judicial notice of these facts. See *State v. Maguire*, 124 Ariz. 64, 601 P.2d 1348 (App. 1978). The Tribe objected to the use of these books,[7] since they were not appropriately before the Trial or Appellate Courts.

In its opinion, the Court of Appeals of the State of Arizona essentially entered two rulings: (a) finding that the Tribe, as a federally recognized tribe, is entitled to sovereign immunity; and (b) finding, under *Native Village of Eyak v. GC Contractors, supra*, that the Tribe had waived its immunity by virtue of the arbitration clause in the agreement.

Both parties filed motions for rehearing to the Court of Appeals, and petitions for review to the Supreme Court of the State of Arizona. Both petitions for review were denied on May 30, 1985.

In its Statement of the Case, Val/Del has reviewed in depth the "history" of the Yaquis, by reference to Spicer I and II. (pages 8-20 of the Petition for Certiorari). The Tribe takes issue with the use of these volumes in general, since they were not properly before the lower court. However, the Tribe will dispute these sources, and the use thereof, in later argument as opposed to addressing them in the Statement of the Case.

REASONS FOR DENYING THE WRIT

There are no special or important reasons for grant-

[7] Response to Petition for Special Action to the Court of Appeals, p. 5.

ing certiorari in this case, within the meaning of Rule 17, Supreme Court Rules ("Considerations Governing Review on Certiorari"). Val/Del characterizes this case as one of "fundamental importance" to the State of Arizona, and more importantly to the citizens living in the Tucson area. In actuality, this is a singular dispute between two parties regarding a private contract. What Val/Del is really concerned about is that it now realizes that the decision of the Court below did not affect the "trust status" of the Pascua Yaqui Reservation where the bingo game was located. Therefore, assuming that Val/Del could eventually prevail on the merits, no valid execution could ever issue to enforce a damages award.

Val/Del has therefore suggested that the current decision below affords it "incomplete relief", and it wants this high court to intervene.

Val/Del stands before this Court as a litigant which chose to enrich itself by engaging in commercial activities on an Indian Reservation, acknowledging the Pascua Yaqui Tribe as a recognized Tribe of Indians exempt from State regulation. It is this exemption which makes these particular activities so lucrative. Indeed, Val/Del's Complaint in this case sought a preliminary and permanent order of specific performance authorizing it to continue operating under the agreement. In light of the passage of time and the fact that no such equitable relief was granted, Val/Del now seeks to ignore its previous recognition of the Tribe's status so that it can "execute against the reservation." Obvious elements of estoppel apply to Val/Del's inconsistent positions throughout this case.

Courts have historically refused to involve them-

selves with the relationship between concepts of waiver of sovereign immunity and the ability of creditors to attach or garnish assets. See *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community,* 138 Ariz. 378, 674 P.2d 1376 (App. 1983); *Maryland Casualty Co. v. Citizens National Bank,* 361 F.2d 517, cert. denied 385 U.S. 918 (1966). This is a recognized risk which parties take when dealing with tribes, and these parties may avoid the problem by asking tribes to pledge specific assets to the venture. Val/Del did not do so.

Further, Val/Del assumes that a ruling that the Pascua Yaqui Tribe is not sovereign would somehow subject these federal trust lands to payment of the debt. There is no authority for this proposition, and there is therefore no realistic remedy for Val/Del even if this Court ruled in its favor.

Besides the clear policy considerations for denying the Writ, Val/Del's entire argument is without legal or factual merit. The Tribe will address the two basic issues below:

I

CONGRESS INTENDED TO RECOGNIZE THE SOVEREIGNTY OF THE PASCUA YAQUI TRIBE

The first issue presented is whether, in enacting 25 U.S.C. 1300(f), Congress intended to recognize the sovereignty of the Pascua Yaqui Tribe.

Of course, Val/Del argues that this legislation merely intended to confer welfare benefits on the Tribe, and that no intent to recognize a sovereign Tribe existed.

Val/Del's convenient argument ignores the plain meaning of the legislation. Further, the legislative history and circumstantial context of the legislation confirm this plain meaning – Congress definitely intended to recognize the Pascua Yaqui Tribe for all purposes.

Certainly, subsection (a) of 25 U.S.C. 1300(f) could arguably be said to only confer benefits (even though the terminology "because of their status as Indians" is persuasive to the contrary).

However, subsections (b) and (c) are clear recognitions of tribal sovereignty when taken in the context of the other legislation to which they specifically apply.

Subsection (b) applies the Indian Reorganization Act to the Pascua Yaqui Tribe.[8] This act *only* applies to "any Indian Tribe, or tribes, residing on the same reservation". See generally, Cohen, Handbook of Federal Indian Law, 1982 Ed., Ch. 1, Sec. B(2) (e).

Subsection (c) applies PL-280[9], which only applies to Indian Tribes, to the relationship between the State of Arizona and the Tribe. This authorized the State of Arizona to accept jurisdiction over the Tribal lands or retrocede. Arizona retroceded. The federal government accepted that retrocession on August 14, 1985, as published at FR Doc. 85-20352 Filed 8-23-85.[10]

The legislative history and circumstantial context of this legislation show clearly that Congressional rec-

[8] 25 U.S.C. 461, et seq.

[9] 18 U.S.C. 1162.

[10] This retrocession was not complete when this lawsuit began. See footnote 2 of Court of Appeals Opinion.

ognition was intended, as derived from the Hearing before the U.S. Senate Select Committee on Indian Affairs on S.1633 on September 27, 1977, (hereinafter "Hearing S.1633"), the Report from the Senate Select Committee on Indian Affairs, No. 95-719 dated March 22, 1978, (hereinafter "Rep. No. 95-719"), the Report from the House Committee on Interior and Insular Affairs No. 95-1021 dated March 30, 1978, (hereinafter "Rep. No. 95-1021"), and the Report from the Conference on Disagreeing Votes, Rep. No. 95-1339 dated July 11, 1978, (hereinafter "Rep. No. 95-1339").

As initially stated by Sen. James Abourezk, Chairman, Select Committee on Indian Affairs,

> "The purpose of this hearing before the Senate Select Committee on Indian Affairs this morning is to take testimony on a bill, S.1633, which would extend recognition to the Pascua Yaqui Band of Indians in Arizona. The Yaqui people have lived in an area including what is now the southwestern United States and Northern Mexico since time immemorial."
>
> Opening statement of Senator James Abourezk, Hearing S.1633, Page 1.

Clearly, the analysis of the legislation shows that the initial Senate proposal extended Congressional recognition to the Tribe, directed the Secretary of the Interior to accept the land in trust which had been conveyed to the Pascua Yaqui Association by Act of Congress in 1964, and repealed Section (4) of the Act of October 8, 1964, which had prevented the Tribe from being eligible for certain benefits, services and assistance provided to Indians. See Rep. 95-719 "Purpose of the Measure", Page 2.

However, the House of Representatives Committee on Interior and Insular Affairs submitted H.R.6612, which would have provided for the extension of Federal benefits, but would not have conferred overall Congressional recognition to the Tribe. See Rep. 95-1021, "Purpose", Page 2.

The Committee of Conference on the Disagreeing Votes of the two Houses (on the Amendments of the House to S.1633) created a compromise. The ultimate legislation, as we now see it enacted under 25 U.S.C. 1300(f), is explained in Rep. No. 95-1339, at Pages 3 and 4. After discussing the initial proposal and the House Amendment, the Joint Explanatory Statement of the Committee of Conference reported as follows:

> "The Conference Committee adopted a substitute, by way of compromise. The House agreed to accept the Senate provision with respect to tribal self-government and reservation status. On the question of jurisdiction, the Senate agreed that the State should continue to exercise criminal and civil jurisdiction on the Pascua Yaqui Reservation lands as if such jurisdiction had been assumed under Public Law 83-280. Public Law 83-280 authorizes a State to exercise comprehensive civil and criminal jurisdiction over Indian Reservations within State boundaries, with specified protections for the trust nature of the land. The State may, at its option, retrocede jurisdiction to the Federal Government on a complete or partial basis by action of the State Legislature."

Based upon the foregoing, there can be no doubt that Congress intended to recognize the Pascua Yaqui Tribe as a sovereign Tribe of Indians.

II

THE ENACTMENT OF 25 U.S.C. 1300(f) WAS NOT BEYOND THE POWERS OF CONGRESS UNDER THE INDIAN COMMERCE CLAUSE

Val/Del argues that any recognition of the Pascua Yaqui Tribe by Congress is unconstitutional under the Indian Commerce Clause, Article I, Section 8 of the Constitution. This clause gives Congress the power to regulate commerce with the Indian tribes. Val/Del contends that the Tribe is not a "Tribe of Indians", and that therefore Congress did not have the authority to deal with the Tribe as an Indian Tribe.

The Tribe's response to Val/Del's argument is twofold: (1) Congressional authority in this field is plenary, the question constituting a political question; (2) If this political question may be reviewed by the Courts, the applicable standard for review is "arbitrariness", a standard which has not yet been defined. However, under any definition of arbitrariness the Congressional Act will stand, since the Pascua Yaqui Indian Tribe has long been recognized as such. The evidence before Congress overwhelmingly supports this conclusion. The authorities cited by Val/Del (Spicer I and Spicer II) were never properly brought before the Arizona Superior Court or the Arizona Court of Appeals. However, if this Court wishes to review those authorities, there is ample evidence contained therein to support the fact that the Pascua Yaqui Tribe was properly recognized as a Tribe of Indians.

1. Congressional Authority Plenary; Political Question.

When Congress has found that a Tribe exists, Courts have not disturbed such determinations. Some of the

older cases have characterized such determinations as political questions, outside the scope of judicial review. See generally *Baker v. Carr,* 369 U.S. 186 (1962); *United States v. Rickert,* 188 U.S. 432 (1903); *United States v. Holliday,* 70 U.S. 407 (1866). No Congressional determination of tribal status has been overturned by the Courts. In light of this, Val/Del relies upon the suggestion that there was a limit on Congress' power to define tribal status, contained in *United States v. Sandoval,* 231 U.S. 28 (1913), in the following passage:

> "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, not by the courts."
> *Sandoval, supra,* 231 U.S. at 46.

The Supreme Court has never defined the "arbitrariness" standard referred to in *Sandoval, supra.* As such the Tribe contends that, in the absence of specific guidelines, the matter is still a political question and is non-justiciable.

2. If Congressional Authority May Be Reviewed, Then The Congressional Decision Was Not Arbitrary.

As stated before, the Courts have not specifically defined the "arbitrariness" standard referred to in *Sandoval, supra.* However, some guidance on this issue is set forth in *The Kansas Indians,* 72 U.S. 737 (1867) which leads to the conclusion that the only practical limitations upon Congressional and Executive decisions

as to tribal existence are the broad requirements that the tribal organization present a "people distinct from others" and that the United States "recognizes their national character". *The Kansas Indians, supra,* 72 U.S. at 755-57.

Assuming that Congressional recognition may be reviewed and set aside if it is "arbitrary", then it is appropriate to review the action taken by Congress in recognizing the Tribe, in light of the available evidence before it. When this is done, it is clear that Congress did not act arbitrarily.

As this Court is well aware, Val/Del has, throughout the history of this litigation, gone to great lengths to quote from two texts by Edward Spicer (referred to as Spicer I and II), for the proposition that the Tribe does not constitute a group entitled to Tribal status. Interestingly enough, Dr. Spicer testified before the Senate Select Committee on Indian Affairs, by virtue of a letter directed to Senator James Abourezk dated September 21, 1977. This letter is presented in its entirety in the transcript of that hearing, at Pages 11 and 12. Dr. Spicer stated the following:

> "I have been associated with the Yaqui people for a period of 40 years. I have lived in their communities for long periods of time. Based on my studies of their history and culture, I have published several books and articles concerning the Yaqui people. A list of my major publications as well as my employment history, my various awards and my professional activities is attached as Exhibit "A".
>
> *One conclusion of my long and extensive study of Yaqui people is that they form a distinct*

Indian group or Tribe. The language their ancestors spoke, and the present day Pascua Yaquis continue to speak is universally classified by linguists as a member of the Uto-Aztecan family of languages to which also belong the languages of the ancient and modern Aztecs, and the Papagos, Pimas, Hopis, and Paiutes of Arizona. This is one of the most widespread and important of North American Indian language stocks. The Yaqui language, as a member of this group, has its own distinctive Indian grammar and sound system wholly unrelated to any language in any part of the world outside of North America. The present day Yaquis including those of New Pascua Pueblo in Arizona speak this same language.

Yaquis have resided in Arizona for more than 200 years. They had a role in the development of the area now known as Arizona ever since the 1700's. Some Yaquis came with the followers of Father Kino to the first missions established in the Upper Santa Cruz Valley. There is documentary record of Yaquis residing in what is now Southern Arizona at Tumacacori in 1796.

During the late 19th century the Yaqui residents of the State of Sonora in Mexico were faced with the determined efforts of the large land owners to divest the Yaquis of their rich home lands. But the Yaquis resisted such efforts effectively for some 50 years. It was not until Mexican Federal troops intervened on the side of the large land owners in the 1880's that the Yaqui resistance was crushed. At this time Yaquis began coming to the United States to escape the unbearable political and cultural oppression. The Yaquis settled in permanent villages near Tucson and Tempe, Arizona. The

United States government admitted these Yaquis as political refugees.

By 1930, there were approximately 2,500 Yaquis in Arizona living in seven settlements including four near Tucson. The history and culture of these villages are described in my book, *Pascua: A Yaqui Village in Arizona,* University of Chicago Press, 1940. Since 1930, the Yaqui population in the state increased to between 5,000 and 6,000, the entire increase being due to the natural growth of the original Yaquis' families.

The Native Indian language continues to be spoken by the Yaquis in Arizona. The distinct Yaqui customs which have been uniquely their own since before the time of European discovery continue to shape and influence their way of life. This central core of Yaqui culture is highly prized by the Yaquis and has been maintained through the whole course of their unique and difficult historical experience."

Hearing, S.1633, P. 11-12 (emphasis added)

In the report from the Select Committee on Indian Affairs, the Committee recognized that the Yaquis are descendants of the ancient Toltecs who ranged from what is now the city of Durango, north to Southern Colorado and west to California. Rep. No. 95-719, Page 3.

The nature of the Yaqui government and culture were explained in detail by Anselmo Valencia, then Director, Pascua Yaqui Association. Hearing S.1633, Pages 5 and 6. Mr. Valencia explained the nine member Tribal Council, which consisted of a Tribal Chairman, Vice-Chairman, Secretary, and Board members. Fur-

ther, he testified that the Yaquis were Indians in every sense of the word, that they had their own language, and their own culture (exemplified by the Pascola Dancing, the Deer Dancing, and the Coyote Dancing, which are Indian in origin). He testified that in the Deer Dance, the Tribesmen sing to honor the great mountains, the springs, the lakes. They sing of their father, the Sun, and of creatures living and dead. They sing of trees and leaves and twigs. They sing of the birds in the sky and of the fish in the ocean. Their drummers play their music on their drums and flutes.

Mr. Valencia closed this portion of his testimony with an interesting analysis of the combination of the Yaqui culture and the Catholic faith.

> "All of the songs sung and played are to the olden times-ancient Yaqui Indian stories. We have also the more modern cultural dances, such as the Matachini and Chapayecks Dances, which we have practiced for over 400 years. We could have been Mormons, Baptists, or any other denomination, and we would still have retained our Indian culture. It just so happened that the so-called conquerors were of the Catholic faith. The Catholic faith and the various governments under which the Yaquis have had to suffer have tried for centuries to undermine our "Yaquiness", but after 400 years they have not succeeded. We have retained our language, our cultural and our Indianness."
>
> Hearing S-1633, Page 6.

The above evidence, as well as all other matters before the Congress, clearly proved that this Tribe signified a unique culture, distinct from any other, which was Indian in nature and which descended from

other ancient tribes traveling throughout the Southwestern United States, ultimately settling in Mexico and Southern Arizona. Congressional recognition was certainly not arbitrary.

Val/Del has also relied upon the "standards" applicable under the Code of Federal Regulations, indicating that Congress did not appropriately apply those regulations in determining whether the Pascua Yaqui Tribe should deserve federal recognition. This argument is totally misplaced, since the regulations were not even in existence at the time of the enactment of 25 U.S.C. 1300(f). See Rep. No. 95-719, P.7. Further, the regulations apply to the Bureau of Indian Affairs, not to Congress.

This leaves Val/Del's references to Spicer I and II as the only authority for non-recognition.

Throughout the course of this litigation, the Tribe has objected to this use of Spicer I and Spicer II. Initially, Val/Del inappropriately attached exhibits to its Response to the Motion to Dismiss before the trial court. In Arizona, a party seeking to introduce extrinsic facts in either supporting or opposing a Rule 12(b) motion shall do so by affidavit. If the court chooses *not* to exclude these affidavits, then the matter is treated as a motion for summary judgment under Rule 56, Arizona Rules of Civil Procedure. *Payne v. Penzoil Corp.*, 138 Ariz. 52, 672 P.2d 1322 (App. 1983). Under Rule 56, summary judgment is permissible only if supported by facts which would be otherwise admissible in evidence, *Mason v. Bulleri*, 25 Ariz. App. 357, 543 P.2d 478 (App. 1975), and the court shall exclude from its consideration any inadmissible evidence. *State ex rel Corbin v. Sabel*,

138 Ariz. 253, 674 P.2d 316 (App. 1983). The court may not take cognizance of positions regarding facts based upon exhibits which are merely parts of briefs and have not been otherwise verified or supported. *Borbon v. City of Tucson*, 27 Ariz. App. 550, 556 P.2d 1153 (App. 1976). These unsupported facts may not be considered, even if they are uncontroverted by the opponent. *Borbon, supra*, 556 P.2d at 1154.

Therefore, there is no question that the trial court should not have considered any of the facts set forth in Val/Del's "extrinsic evidence". It is apparent that the court did not consider these facts, by review of the Minute Entry denying the Motion to Dismiss. Further, any reference to these facts in the Court of Appeals decision is dicta, since the facts were unnecessary to the determinations made by that court.

If, however, this Court decides that the facts set forth in Val/Del's Petition should be considered, then the Tribe refers this Court to ample evidence contained within those volumes which contradicts Val/Del's position and supports the argument that the Congressional decision was not arbitrary. In so doing, however, the Tribe does not agree to the use of these exhibits or waive any further rights to object to these exhibits.

Val/Del's reliance on Spicer I and Spicer II, as authority for the proposition that Congress acted in excess of its power in recognizing Yaqui sovereignty, is quite misplaced. Val/Del has taken convenient bits and pieces from the context of Spicer's anthropolgical study of a distinct tribe and from these bits and pieces has drawn the conclusion that the tribe does not exist. Spicer most certainly never made this conclusion, as is clear from his testimony before Congress in 1977.

Val/Del maintains that the Pascua Yaqui Tribe of Arizona has never had any of the attributes of a sovereign nation and, that therefore it has no claim to sovereign immunity as part of a heritage which predates Congressional recognition. Val/Del claims that the Yaqui lack cultural integrity, being "integrated more by religion than anything else" (Petition for Certiorari, Page 20), that the Yaqui in Arizona have never had "any semblance of self-government" (Petition for Certiorari, Page 20) and that the Yaqui are not indigenous to Arizona. These claims are patently erroneous.

Spicer first undertook his study of the Yaqui Village of Pascua in the late 1930's. At this time the Yaqui society was suffering the effect of substantial relocation of its people brought about by encroachment on its lands by the Mexican government. (Spicer I, 19)

The Yaquis had lived in Arizona for many generations, having been listed among the residents of Tumacacori Mission in a 1796 census, but the most recent major immigration from Mexico had occurred in the years 1900 to 1910. (Spicer II, 236, 237) Although the Yaquis had developed organized communities in the Tucson and Phoenix areas by 1909, when Spicer first encountered the Tribe it was undergoing changes which necessarily accompany rapid assimilation to new conditions. (Spicer II, 242). Yet at this time of the Tribe's greatest cultural suppression, Spicer had no difficulty in identifying the Yaqui as a discrete group for study. Spicer's interest in the Yaquis' ability to maintain their cultural integrity distinct from the Mexican population surrounding them in their United States community was what initially led him to Pascua. Spicer noted that the Tribe's adaptation to the United States had not resulted

in any breakdown of cultural organization among the Yaqui. (Spicer I, xviii) Throughout his work Spicer refers to the Pascua Yaqui as "Yaqui Indians", as members of the "Yaqui Tribe", and as an "enduring people" with a unique identity. (Spicer I, 4, 18; Spicer II, Chs. 6 and 7). Spicer states:

> "The Yaquis who spun off into the United States from the mainstream of Yaqui development — did not disappear from Yaqui history. They neither melted into the society of Arizona by losing their identity nor returned to the homeland . . . instead they founded new settlements which became vigorous communities influencing Sonoran Yaquis in many ways and bearing a variant stream of Yaqui tradition."
> Spicer II, 235-236.

The Yaquis speak their own language, which Spicer identifies as Uto-Aztecan language which "has existed continuously for 350 years and probably much longer". (Spicer I, 8; Spicer II, 289) While Spanish influence is evident in many Yaqui words, the Yaqui language remains distinct from the Spanish language.

> "The Yaqui spoken in 1970 could probably be understood by a Yaqui Indian of 1600 or 1700, provided he or she listened to it for some weeks and became familiar with the minor sound shifts and the tremendous number of new words incorporated since the 16th Century."
> Spicer II, 290

Obviously, the Yaqui language is an important cultural unifier totally ignored by Petitioner.

Another unifying element in Yaqui culture, as in

many cultures, is their religion. It is characterized by a cycle of ceremonies and dances which are organized by ceremonial societies and which combine ancient aboriginal religion with the unique expression of Christian concepts introduced since the 16th Century. This religion is very important to the Yaqui. (Spicer II, Ch, 2) Yet to say that the Yaqui are integrated more by religion than anything else is to ignore all of the additional elements which comprise a common lifeway and which are uniquely expressed by the Yaqui Tribe. These include the Yaqui kinship system, the ceremonial societies (serving important economic and social functions as well as ritual ones), a shared system of values and a cultural history which has survived the generations and is well known to them today (as detailed in Spicer II).

The Yaqui are undeniably a distinct tribe of American Indians unified by a common language, religion, social structure, and cultural history. They are as deserving of recognition as a sovereign entity as any North American Indian Tribe recognized by Congress.

The Yaqui have always maintained self-government. While the cultural suppression which occurred during the late 19th and early 20th centuries resulted in some disruption of traditional Yaqui leadership as it had been manifested in earlier periods, the Yaqui communities of Arizona have at all times maintained internal control. Spicer detailed the system of leadership within the community of Pascua during the period he first contacted the Tribe as a combination of the civil and religious realms of authority. Leaders of the Fariseo and of the Matachin societies were the recognized village leaders at alternate seasons of the year. (Spicer I, 146, 147)

Therefore, even Val/Del's factual sources lead to the conclusion that the Tribe was properly recognized.

Despite the fact that neither the statutes, the regulations nor the case law require that an Indian Tribe be indiginous to the United States or to its reservation lands for Congressional recognition, Val/Del repeatedly has asserted that the Yaqui are recent immigrants to the United States. Not only is this irrelevant based upon the status of the law, but it is clearly in conflict with the evidence. In seizing upon specific instances of cultural change and disruption to argue that the Pascua Yaquis are not now a tribe, Val/Del ignores the similar histories of most federally recognized tribes who have been subjected to uprootings, transplantations and rapid readjustments, which have been commonplace throughout the United States. Congress did not act arbitrarily in recognizing the Pascua Yaqui Indian Tribe as sovereign. To characterize this recognition as "manifestly unauthorized exercise of power" such as calling the Irish or Haitian immigrants American Indians, is ridiculous.

CONCLUSION

In conclusion, Congress intended to recognize the sovereignty of the Pascua Yaqui Indian Tribe in enacting 25 U.S.C. 1300(f). Congress did not act "arbitrarily" in making this recognition. The evidence before Congress, as well as the inadmissible extrinsic materials presented by Val/Del prove clearly that Congress correctly recognized the long-standing Tribal status of the Yaqui people.

The Petition for Certiorari should therefore be denied.

DATED this 16th day of September, 1985.

LANSDALE & KNEIP, P.C.

By Gary S. Kneip
GARY S. KNEIP
Attorneys for Respondent
PASCUA YAQUI TRIBE

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

GARY S. KNEIP, being first duly sworn, upon his oath, deposes and says:

That in accordance with Rule 28.2, United States Supreme Court Rules, he has deposited this 26th day of September, 1985, in a United States Post Office, with first class postage prepaid, and properly addressed to the clerk of this Court, within the time allowed for filing, 40 copies of Pascua Yaqui Tribe, Real Party in Interest, Response to Petition for Certiorari.

Further, he has deposited this 26th day of September, 1985, in a United States Post Office, with first class postage prepaid, two copies of said Response to Petition for Certiorari properly addressed to the attorney for the Petitioner herein.

Gary S. Kneip

GARY S. KNEIP

SUBSCRIBED AND SWORN to before me this 26th day of September, 1985, by GARY S. KNEIP.

Notary Public

My Commission Expires:
10-19-87

Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-348

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

VAL/DEL, INC.,
A Delaware corporation, Petitioner

v.

SUPERIOR COURT OF ARIZONA,
COUNTY OF PIMA, et al.
(Pascua Yaqui Tribe, Real Party
in Interest), Respondents

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF ARIZONA, DIVISION TWO

REPLY TO RESPONSE TO PETITION FOR CERTIORARI

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Petitioner Val/Del, Inc., will confine itself to matters first raised in the Response. See Rule 22.5, Supreme Court Rules. In Arizona courts, the Tribe has relied exclusively upon Congressional recognition. Now, for the first time in these proceedings, the Tribe attempts to show that there are factual matters which would support a recognition by Congress of its tribal status.

The assertion is made at page 5 of the Response that at the trial level the Tribe "pointed out, among other things, that the use of the Spicer publication was questionable, and could certainly not be used to overrule Congressional mandate." This assertion is incorrect; the first objection of any kind taken to the trial court's judicial notice of the Spicer publications was at the Court of Appeals level. But regardless, the Arizona courts did take

judicial notice of Yaqui history, and rightfully so.

The assertion is made "there is no indication that the Court [trial court] gave any credence to Val/Del's exhibits of 'historical fact.'" Response at 5. This is incorrect. Judge Lillian Fisher, trial judge, in granting the Motion to Dismiss, stated:

> "Although such recognition [that of a sovereign tribe] may grant to the Pascua Yaqui Indian, who migrated to this country from Mexico, certain rights that are not available to other persons who migrated to the United States from Mexico, the Pascua Yaqui Indians are not precluded from seeking and obtaining status as a federally recognized Indian tribe." Minute Entry of August 7, 1984.

The only possible source for the information regarding migration was judicial notice -- presumably of Spicer I.

The expression of objection to the Spicer publications at the Court of Appeals level was perfunctory and consisted only of

the following sentence, included within a ten-page brief:

> "Petitioner offers in rebuttal two books in their entirety (Petitioner's Exhibits J and K), which books were not in evidence before the lwoer [sic] court and which are not properly attached as part of this Special Action. Neither book has the force of Federal law." Memorandum of Points and Authorities in Support of Pasqua Yaqui Tribe's Response to Petition for Special Action at 5.

There is no explanation of what the Tribe considers proper attachment. To this memorandum resisting special action, the Tribe attached four exhibits, consisting of thirty-nine pages, none of which in any way question the authority of Spicer nor the historical facts pertaining to the Yaquis in Arizona. The migration facts, noticed by Judge Fisher, were summarized for the Court of Appeals, similarly to the manner in which they have been summarized for this Court. In the briefs filed in the state courts, the Tribe has never attempted to

deny its Mexican origins or to assert that it has exercised any degree of self-government in this country.

Arizona has adopted its Rule 201 from the Federal Rules of Evidence (Rule 201) pertaining to judicial notice.

The case cited by the Tribe, *State v. Maguire*, 124 Ariz. 64, 601 P.2d 1348 (App. 1978), correctly states the rule that

> "an appellate court can take judicial notice of any matter of which the trial court may take judicial notice, even if the trial court was never asked to do so." 124 Ariz. at 65, 601 P.2d at 1349.

Here, both the trial and appellate courts were asked to take judicial notice of the history of the Yaquis. The trial court was pointed to Spicer I, the 1940 publication, and the appellate court to both this and Spicer II, the 1980 publication. Both courts accepted the Spicer works as containing materials whose accuracy cannot reasonably be questioned, and indeed, there

is no indication now that the Tribe questions the accuracy of Spicer's work.

The Court of Appeals' decision recognized that history establishes that these Indians have never exercised any political autonomy in the United States:

> "Petitioner presented to the trial court two books by Dr. Edward H. Spicer as authority for the proposition that the Pascua Yaqui Tribe would not qualify for federal recognition under the Code of Federal Regulations requirements. Spicer was an acknowledged authority on the history of the Pascua Yaquis, and his books establish that the Yaquis do not have single roots but are a historically mixed-blood people who lived in western Mexico on the Gulf of California from approximately the 1600's to the present. Beginning in the late 1880's, small groups came from time to time across the international border to Arizona and California. Therefore, Petitioner argues, since the Pascua Yaquis are not indigenous to this area, but rather are immigrants from Mexico, and because Dr. Spicer's books show that the tribe has not attempted to revive any system of government their predecessors may have established in Mexico, they could not qualify for federal recognition under 25

C.F.R. §83.7. We cannot fault this conclusion and, in essence, neither does the tribe." Court of Appeals Decision at 5-6.

The Court of Appeals went on to cite *Atkinson v. Haldane*, 569 P.2d 151 (Ala. 1977), and to hold that the question of whether this Tribe is entitled to sovereign immunity is a "nonjusticiable political question". Court of Appeals Decision at 6-7.

The Arizona courts were not remiss in taking judicial notice of the Yaqui history. *See State of Arizona v. State of California*, 51 S. Ct. 522 at 525, 283 U.S. 423, 73 L. Ed. 1154 (1931); *Kengla v. Stewart*, 313 P.2d 424, 82 Ariz. 365 (1975); and *Pawnee Indian Tribe v. U.S.*, 109 F. Supp. 860 at 870 (U.S. Ct. Cl. 1953).

Though the Tribe has carefully selected quotations from Spicer for its Response, there is nothing called to this Court's attention which indicates that these Indi-

ans have ever exercised any degree of political independence in this country.

A reading of all of the excerpts quoted establishes only that the Tribe had a unique religion, culture and language, which are different from those of the indigenous Indians of Arizona.

It has never been questioned by the Petitioner that the Yaqui Indians constituted a "tribe" in Mexico, and, as a matter of fact, the historical recitation pertaining to these Indians which has been submitted to this Court points out that the Yaqui towns in Sonora, contrasted with those in this country, had self-government (Petition at 14-15). The Yaqui Tribe still has a form of self-government in Mexico, in its native territory, on the Yaqui River. As part of the record below, the history of these people has been summarized in this language:

> "The Yaquis were restored to semi-autonomy in Mexico in 1937, when President Cárdenas, by presidential decree, set aside to the 'Yaqui Tribe' about a third of the lands the Yaquis had traditionally claimed, being those mostly on the north side of the [Yaqui] river (*id.*, [Spicer II], 265). A 'peculiar democracy' was established in the 'Yaqui Zone' under a unique system called the 'Yaqui Indigenous Community' (*id.*, 277-83). About 20,000 Yaquis reconcentrated in this Zone (*id.*, 274)." Petition for Review at 5.

Spicer, of course, was not contradicting his own history when he made the statement italicized at pages 14-15 of the Response:

> "One conclusion of my long and extensive study of Yaqui people is that they form a distinct Indian group or Tribe."

This statement, of course, has nothing to do with the issue here, and this is the best that the Respondent can do. What is apparent and admitted is that the Yaquis are a Mexican Indian Tribe of which some members have migrated to this country. These people are culturally different from

other U.S. citizens. The same can be said of many Jewish, Polish, Italian, Chinese and Irish communities in various of our larger cities, such as New York, Chicago, Detroit, Los Angeles and San Francisco. But speaking a different language and having a cultural uniqueness does not create an independent government, and this is what is happening when a recognition of sovereignty to an Indian tribe is granted.

RESPECTFULLY SUBMITTED this 17th day of October, 1985.

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